

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1291

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
UNITED STATES OF AMERICA, :
:
Plaintiff-Appellee, :
:
-against- :
:
CHRISTOPHER JOHNSON, :
:
Defendants-Appellants. :
:
-----X

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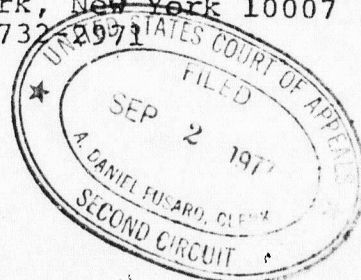
Docket No. 77-1291

APPENDIX TO BRIEF
FOR APPELLANT
CHRISTOPHER JOHNSON

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
Christopher Johnson
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel.



PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET - U.S. District Court

OFFENSE NO. JUDGE/MAGISTRATE Assigned U.S.
 OFFENSE NO. 0208-1 0863
 DEFENDANT'S NAME District Office
 FELONY Pet ☒ (LAST, FIRST, MIDDLE)

JOHNSON, CHRISTOPHER

Case Filed
 Mo. Day
 01 03
 No. of Days
 02

77 0007 02

Docket No. Def.

U.S. TITLE/SECTION

21:846
 21:812, 841

OFFENSES CHARGED

Consp. to violate Federal Narcotics Laws
 Distr. & possess. of Heroin, I.

ORIGINAL COUNTS

1
 2-3

U.S. MAG. CASE NO. 76-1261

MAIL - RELEASE

☐ AMT ☐ Fugit
 Sent Set ☒ Para Recog
☒ PSA
 \$ 0.00 Conditions
☐ Date ☐ 10% Deposit
☐ 30% Not Made ☐ Surety Bond
☐ Status Changed ☐ Conateral
 (See Docket) ☐ 3rd ☐ Pmt Cust ☐ Other

KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Began *11/3/76	High Risk Date 1-3-77	1-13-77	Trial Set For 1-13-77
Summons Served	Indict. Waived ☐	1st Plea 1-13-77	NG ☒ G ☐ NOT (G. Plea W. Drawn)
First Appearance	In Charging District ☐	Final Plea	Trial Began 5-9-77 Trial Ended 5-12-77

SUPERSEDING COUNTS

SENTENCE

Disposition of Charges
 6-15-77
☒ Convicted
☐ Acquitted
☐ Dismissed
☐ On All Charges
☐ On Lesser Offenses
☐ On Government Motion

MAGISTRATE

DATE	INITIAL NO.	INITIAL APPEARANCE DATE	INITIAL NO.	OUTCOME
11/4/76	LB-08AH	11/4/76	LB-08AH	HELD FOR CL OR OTHER PROCEEDING IN THIS DISTRICT
11/24/76		11/24/76		HELD FOR CL OR OTHER PROCEEDING IN DISTRICT COURT
11/4/76	LB-08AH			
21 USC 812,841(a)(1), 841(b)(1)(A) and 846 - NARCOTICS				

U.S. Attorney or Asst.

Henry H. Korn
 791-1991

ATTORNEYS

Leonard F. Joy
 Legal Aid Society
 15 Park Row, N. Y. C. 577-3407

OTHER DEFENDANTS AND DOCKET NUMBERS OF OTHER DEFENDANTS ON SAME INDICTMENT/INFORMATION

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
11/4/76		Complaint filed, counsel to be assigned. Defendant released on his own recognizance.	
11-5-76		Legal Aid (Joy) assigned for all purposes.	
1/3/77		Indictment filed, 77 Cr. 7 Carter, J.	
1-13-77		Deft. (atty. Leonard F. Joy present) pleads not guilty. R.O.R. Case assigned to Werker, J. for all purposes. MacMahon, J.	
2-3-77		P.T.C. counsel only trial date April 18-1977... Werker, J.	
4-12-77		AUSA Korn & Leonard Joy Esq. present Trial date set as to deft. Johnson on May 2, 1977 at 10 A.M. in room 519 ...WERKER, J.	
5-9-77		Deft present w/atty Leonard Joy of Legal Aid & AUSA Denise Cote Jury trial begun....WERKER, J.	
5-10-77		Jury trial continued. Deft moves to discontinue counts 1 & 3 of the indictment. Motion is denied on count ONE (1) & on count THREE (3) is GRANTED....WERKER, J.	

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DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY
DOCUMENT NO.			
-11-77	Jury trial continued & concluded- Jury deliberations begun..... WERKER, J.		
-12-77	Jury deliberations continued, Jury verdict GUILTY on counts 1 & 2 PSI ordered. Sent date 6-15-77 at 9:30 A.M. in room 401 Bail of R.O.R. continued.....WERKER, J.		
6-3-77	Filed Pltff's Affdvt. for a W/H/C Ad Prosequendum directing the Warden of the Ossining Corr. Fac., to produce deft. to U.S.D.C. S.D.N.Y., on June 15th, 1977 at 9:30 a.m. Writ issued. Ret. 6-15-77.		
6-15-77	Filed JUDGMENT & COMMITMENT Deft (in custody on writ) present Atty Leonard Joy & AUSA D. Cote. The deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on counts 1 & 2 to run concurrently with each other to be followed by THREE (3) YEARS Special Parole on each count, again to run concurrently with each other. The deft is to be released as if placed on parole after serving TWENTY (20) MONTHS of his prison sentence. The three years Special Parole is under Title 21 United States Code Section 841. The deft has been notified of his right to appeal within ten (10) days & his right to an atty during his appeal. Writ Satisfied WERKER, J. copies issued (ent 6-17-77)		
6-17-77	Filed W/H/C AD Pros. Writ satisfied 6-16-77...WERKER, J.		
6-21-77	Filed commitment & entered return, Deft delivered to COPY LOGGED WITH WARREN RIVERS ISLAND, N.Y. ON 6-20-77		
6-24-77	Filed notice of appeal from the judgment of conviction entered on the 15th day of June 1977. (Mailed notice to deft's atty) and U.S. Atty		

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FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 3007

UNITED STATES OF AMERICA

- v -

JAMES P. ZAYAS and
CHRISTOPHER JOHNSON,

Defendants.

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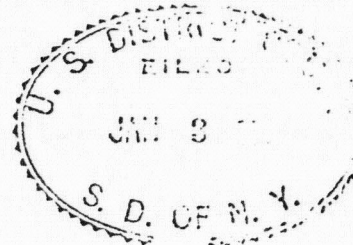
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INDICTMENT

76 Cr.



The Grand Jury charges:

1. From on or about the 1st day of August, 1976 and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, JAMES P. ZAYAS and CHRISTOPHER JOHNSON, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 19th day of August, 1976, the defendants, JAMES P. ZAYAS and CHRISTOPHER JOHNSON, met in an apartment at 1355 Shakespeare Avenue, Bronx, New York.

2. On or about the 19th day of August, 1976, the defendant, JAMES P. ZAYAS had a conversation with a person in which the defendant, JAMES P. ZAYAS, stated that he and the defendant, CHRISTOPHER JOHNSON, would sell one-eighth (1/8) of a kilogram of heroin to an agent of the Drug Enforcement Administration, acting in an undercover capacity.

3. On or about the 19th day of August, 1976, the agent purchased one-eighth (1/8) of a kilogram of heroin from the defendants, JAMES P. ZAYAS and CHRISTOPHER JOHNSON, and the defendants received as payment for the sale \$11,000.

4. On or about the 19th day of August, 1976, the agent was informed that the defendants, JAMES P. ZAYAS and CHRISTOPHER JOHNSON, were interested in making further sales of heroin to the agent.

5. On the 3rd day of September, 1976, the agent met with the defendant, JAMES P. ZAYAS, at 173rd Street and Fort Washington Avenue, New York, New York and discussed a further purchase of heroin from the defendant, CHRISTOPHER JOHNSON.

6. On the 17th day of October, 1976, the defendant, JAMES P. ZAYAS, telephoned the agent and told the agent that the defendant, CHRISTOPHER JOHNSON, was ready to sell one quarter (1/4) of a kilogram of heroin to the agent on the following night.

7. On the 18th day of October, 1976, the agent met the defendant, JAMES P. ZAYAS, in the vicinity of 559 West 188th Street, New York, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 19th day of August, 1976, in the Southern District of New York, JAMES P. ZAYAS and CHRISTOPHER JOHNSON, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth (1/8) of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 18th day of October, 1976, in the Southern District of New York, JAMES P. ZAYAS and CHRISTOPHER JOHNSON, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one quarter (1/4) of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and Title 18, United States Code, Section 2.)

Donella H. Bennett
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

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77-10007

Form No. USA-22a-274 (Ed. 9-25-58)

JUDGE WERKER

JAN 8 - 1977

indictment filed.

Carter, C

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

JAMES P. ZAYAS and
CHRISTOPHER JOHNSON,

Defendant.

INDICTMENT

76 Cr.

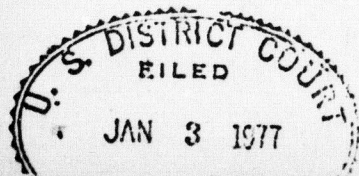
(21 U.S.C. §§ 812, 841(a)(1),
841(b)(1)(A), and 846.)

ROBERT B. FISKE, JR.

United States Attorney.

TRUE BILL

Foreman.



January 13, 1977-

Def't. James P. Zayas (Atty: Andrew Maloney -
Assigned by court or counsel) pleads not
guilty. ROR.

Def't. Christopher Johnson (Atty: Leonard F. Joy) pleads not guilty.
ROR. Assigned Werker for all
purposes.

Feb. 3, 1977

P.T.C. counsel only Trial Date April 18, 1977.

18

WERKER, J.

APRIL 12, 1977

AUSA KORN & LEONARD JOY, Esq. present Trial date set as to Def't CHRISTOPHER JOHNSON on May 2, 1977 at 10 A.M. in Room 519.
Def't JAMES P. ZAYAS is FUGITIVE on other indictment.

WERKER, J.

MAY 9, 1977 -

Def't. Johnson present w/ atty. Leonard Joy of
Legal Aid & AUSA Denise
begun. Jury trial
Werker, J.

MAY 10, 1977 - Jury trial cont'd. Def't. moves to

Def. J. -
11, 1977 - Jury trial cont'd. + concluded. Jury
deliberations begin. Werker, J.

Def. Johnson
12, 1977 - Jury deliberations cont'd. Jury
found Defendant guilty on cts. 1 & 2. PI ordered.
date 6/15/77 at 9:30 Am in Rm. 401. Bail
set cont'd. Werker, J.

15, 1977 - - Def. (in custody on writ) present - / atty.
and jury + AUSA Denise Cote. Def. sent as follows.
142 -- 5 yrs. impr., ex. ct. concurrent. Def. to be
used as if on parole after serving 20 months, followed
3 yrs. S.P., ex. ct. concurrent. Def. satisfied of
right to appeal + his right + counsel. Unsatisfied.
Werker, J.

19 1977

At JAMES P. ZAYAS, No appearance, AUSA Denise Cote
his application BENCH WARRANT - Granted
JUDGE WERKER
J

11 THE CLERK: The Court is about to charge the
12 jury.

13 Any spectator who wishes to leave the courtroom
14 will do so now or you are to remain seated until the
15 completion of the Court's charge.

16 Will the marshal please lock the door.

17 THE COURT: Mr. Foreman, ladies and gentlemen
18 of the jury.

19 Now that the evidence is all in and counsel
20 have summed up their respective contentions, the time has
21 come for you and me to perform our respective functions
22 in the administration of the justice in this case.

23 As I stated to you at the outset, it is my duty
24 to instruct you as to the principles of law to be followed,
25 and it is your duty to accept these instructions as they are

2 given by me and to apply them to the evidence in this case.

3 The indictment against the defendant is not
4 evidence and it does not carry with it any presumption of
5 guilt. It is merely a means by which the defendant and
6 jury are informed of the nature of the charges or accusa-
7 tions and the means of bringing the defendant to trial.

8 The defendant in this case has pleaded not guilty
9 and by that plea has put in issue each of the elements of
10 the charges made against him.

11 You may not give any weight whatever to the fact
12 that an indictment has been returned against the defendant.
13 It is your duty to determine the facts as derived from your
14 consideration of the evidence in this case and then applying
15 the principles of law to decide whether the defendant on
16 trial before you is guilty or not guilty of any of the
17 charges made against him.

18 You are the sole and exclusive judges of the
19 facts. If your recollection of the evidence differs in
20 any way from the recollection of counsel or the Court, your
21 recollection controls and should be relied on by you. Your
22 judgment as to what the facts are controls.

23 The Government and the defendant are equally
24 entitled to justice in this court. The fact that this
25 prosecution is brought in the name of the United States of

America does not entitle the Government to any greater consideration than any other litigant would get. But by the same token, it is entitled to no less consideration.

The issues in this case must be decided on the evidence and on the law. In this regard, you are instructed that the statements and arguments of counsel are not evidence, unless made as an addition or a stipulation of fact.

Before I turn to the indictment in the case and the charges that are made against the defendant here, let me first give you a few basic principles that should govern you in your deliberations.

First of all, you should approach your duty with an attitude of complete fairness and impartiality, one in which you reach your decision solely on the basis of the evidence and in accordance with the legal instructions that I am about to give you.

Each side is entitled to the same fairness that you would want if you were a party to a lawsuit.

Under your oath as jurors, you should not and cannot allow sympathy for the defendant or consideration of punishment he might receive should he be found guilty to enter into your deliberations or to affect or influence your judgment in any way.

The duty of imposing sentence in the event of a conviction would rest exclusively upon the Court and upon the Court's own conscience.

During the trial I have been called upon to make rulings from time to time. I have sustained some objections, I have overruled others, and on one or two occasions I may have ordered testimony stricken and have advised you to disregard it.

It is important in the performance of your duties that you limit your consideration of the evidence to that which was actually received in the case and not give any consideration to any evidence which was stricken.

It is equally important that you not draw inferences against either side because of any objections that counsel may have made during the trial or any arguments that counsel may have made or the fact that it may have been necessary from time to time to engage in conferences at the side bar or to exclude you from the courtroom altogether.

Under our system of justice in this country, it is the function and duty of counsel to object to anything that they think is legally improper and they would be remiss in this duty if they failed to do so. But it is my function and duty to rule on these questions of law, and I would

2 be remiss in my duty, too, if I failed to make such rulings,
3 even though sometimes they may not have been to the liking
4 of counsel for either side.

5 If during the course of the trial from my rulings
6 or questions or facial expressions or some of the questions
7 that I may have put to witnesses you got the impression
8 that I personally have any views on the credibility of any
9 of the witnesses or on the weight to be given to their
10 testimony or to the proof or to the merits of the case,
11 please disregard it. It is not my intention to imply or
12 express any opinion or any views to you with respect to
13 the facts in the case or the merits or the credibility of
14 any witness. That is your sole and exclusive function.

15 Any questions which I may have put to a witness
16 during the course of the trial have been put to those
17 witnesses in an attempt to clarify issues which you might
18 ultimately decide. It was not to give you the impression
19 that I was siding one way or the other. Whatever my feelings
20 may be in this matter are completely immaterial and irrelevant.

21 Now, no inference, as I have indicated to you,
22 is to be drawn from the indictment or from the fact that
23 an indictment has been filed. The Grand Jury was not
24 asked to determine whether the defendant was guilty or not
25 guilty of the charges contained in the indictment. That

2 is your function as jurors and your function alone.

3 Under our law, every defendant -- and that is
4 true of the defendant in this case -- is presumed to be
5 innocent. That presumption of innocence is in the defendant's
6 favor throughout the entire trial and extends even into your
7 deliberations in the Jury Room. It is overcome only if, as
8 and when you determine that his guilt has been established
9 beyond a reasonable doubt by the credible evidence in the
10 case.

11 The burden is upon the Government to establish
12 the defendant's guilt beyond a reasonable doubt, and that
13 burden applies to every element of each crime charged against
14 the defendant. That burden of proof never shifts to the
15 defendant; it always remains with the Government right
16 down to the end of the trial.

17 Although the indictment here names two defendants,
18 only Christopher Johnson is on trial before you. Although
19 as I will explain to you shortly, in considering whether
20 he is guilty or not guilty, you may have to determine the
21 nature of the participation, if any, of Mr. Zayas.

22 In determining whether the defendant is guilty
23 or not guilty, you must bear in mind that guilt is personal.
24 This means that whether the defendant on trial before you
25 is guilty or not guilty must be determined separately beyond

1 a reasonable doubt with respect to him solely on the evidence
2 presented against him, or the lack of such evidence. The
3 case stands or falls upon the proof or lack of proof of
4 the charges against this defendant and not against somebody
5 else.
6

7 Now, before I read any of the indictment to you,
8 there is a difference of which you should be aware between
9 Count 1 on the one hand and Count 2 on the other.

10 The first count charges a conspiracy. It charges
11 that the defendant here on trial, together with another
12 co-conspirator, conspired to violate the Federal laws prohibit-
13 ing knowing distribution and possession with intent to
14 distribute narcotics.

15 I shall refer to this as the conspiracy count.
16 It reads as follows:

17 "1. From on or about the first day of August,
18 1976, and continuously thereafter, up to and including the
19 date of the filing of this indictment, in the Southern Dis-
20 trict of New York, James P. Zayas and Christopher Johnson,
21 the defendants, and others to the Grand Jury unknown,
22 unlawfully, intentionally and knowingly combined, conspired,
23 confederated and agreed together and with each other to
24 violate Sections 812, 841(a)(1), 841(b)(1)(A) of Title 21,
25 United States Code.

1 gtlm
2 "2. It was part of said conspiracy that the
3 said defendants unlawfully, intentionally and knowingly
4 would distribute and possess with intent to distribute a
5 Schedule I narcotic drug controlled substance, the exact
6 amount thereof being to the Grand Jury unknown, in violation
7 of Sections 812, 841(a)(1), and 841(b)(1)(A) of Title 21,
8 United States Code."

9 Count 2 of the indictment charges the defendant
10 and James Zayas with an actual violation of those laws;
11 the knowing distribution and possession with intent to
12 distribute narcotics.

13 Count 2 of the indictment is what is referred
14 to as the substantive count. It reads as follows:

15 "On or about the 19th day of August, 1976, in
16 the Southern District of New York, James P. Zayas and
17 Christopher Johnson, the defendants, unlawfully, intention-
18 ally and knowingly did distribute and possess with intent
19 to distribute a Schedule I narcotic drug controlled sub-
20 stance, to wit, approximately one-eighth of a kilogram
21 of heroin."

22 A conspiracy to commit a crime is an entirely
23 separate and different offense from the substantive crime
24 which may be the objective of the conspiracy. Conspiracy
25 is collective criminal activity or an agreement or under-

standing to violate other laws. It presents a greater potential threat to the public and is usually more difficult to detect than the illicit or criminal activity of a single individual. Thus, if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime.

Consequently, in a conspiracy charge there is no need to prove an actual violation of the laws pertaining to distribution or possession with intent to distribute -- that is, the elements of the substantive offenses alleged.

In order to find the defendant guilty of conspiracy as charged in the first count of the indictment, you must find each and every one of the following elements beyond a reasonable doubt.

First, that at some time during the period from on or about August 1, 1976 up to and including the date of the filing of the indictment on January 3, 1977, in the Southern District of New York, an agreement existed between Christopher Johnson and James P. Zayas.

Second, that it was an object of this agreement for the co-conspirators, or any of them, to knowingly distribute and possess with intent to distribute heroin.

Third, that the defendant knowingly and willfully associated himself with the conspiracy and participation in it.

2 Fourth, that one of the conspirators, not necessar-
3 ily the defendant Christopher Johnson, knowingly committed
4 at least one of the overt acts set forth in the indictment
5 at or about the time and place alleged.

6 I will read those to you in a moment.

7 If the Government fails to establish each
8 essential element beyond a reasonable doubt, you must
9 acquit the defendant on this count. If it succeeds, your
10 duty is to convict him on this count.

11 Now, what is a conspiracy?

12 A conspiracy is a combination or agreement of
13 two or more persons to accomplish a criminal or unlawful
14 act by concerted action through criminal or unlawful means.

15 The gist of the crime of conspiracy is the unlaw-
16 ful combination or agreement to violate the law. Whether
17 or not the defendant accomplished what it is alleged he
18 conspired to do is immaterial to the question of whether
19 the defendant is guilty or not guilty of conspiracy.

20 A conspiracy has sometimes been called a partner-
21 ship in criminal purposes in which each member becomes
22 the agent of every other member. However, to establish
23 that a conspiracy existed, the Government is not required
24 to show that two or more persons sat around a table and
25 entered into a solemn compact orally or in writing stating

1
2 that they have formed a conspiracy to violate the law, setting
3 forth details of the plans, the means by which the unlawful
4 project is to be carried out or the part to be played by
5 each conspirator. Indeed, it would be extraordinary if
6 there was such a formal document or specific oral agree-
7 ment.

8 Your common sense will tell you that when people,
9 in fact, undertake to enter into a criminal conspiracy, much
10 is left to unexpressed understanding. Conspirators do not
11 usually reduce their agreement to writing or acknowledge
12 it before a notary public, nor do they publicly broadcast
13 their plans. From its very nature, a conspiracy is almost
14 always characterized by secrecy, rendering detection diffi-
15 cult.

16 Thus, it is sufficient if two or more persons,
17 in some manner or through some contrivance, impliedly or
18 tacitly, come to a common understanding to violate the
19 law.

20 To simplify this perhaps a bit more, success in
21 carrying out the objective of the venture, if you believe
22 it was successful, may serve as proof that there was a
23 common venture or agreement.

24 In determining whether there has been an unlawful
25 agreement, you may judge acts and conduct of the alleged

members of the conspiracy which are done to carry out an apparent criminal purpose. The adage, "Actions speak louder than words," is applicable here.

Usually the only evidence available is that of disconnected acts on the part of the alleged individual conspirators which acts, however, when together taken in connection with each other and with the reasonable inferences flowing from them show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof. The conspirators need not have previously associated together.

If after consideration of all the evidence you find beyond a reasonable doubt that the minds of the two alleged conspirators met in an understanding way and that they agreed as I have explained a conspiratorial agreement to you to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the existence of the conspiracy is established.

In this case, the defendant is charged with a conspiracy to violate the Federal narcotic laws by scheming, first, to distribute heroin and, second, to possess heroin with intent to distribute it.

In order to find the defendant guilty of the conspiracy charged in the indictment you must find that

one of the two violations of the Federal narcotics law that I have just described to you or both were objectives of the conspiracy.

The indictment charges that the conspiracy existed from on or about the 1st day of August, 1976, and continuously thereafter up to and including the date of the filing of the indictment, January 3, 1977.

You need not find that the conspiracy began and ended exactly on those dates. It is sufficient if you find that, in fact, a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment and that at least one overt act was committed during that period.

A conspiracy continues for as long as the evidence shows the conspirators intended to continue it. Such intention may be inferred from the activities of the conspirators in furtherance of the unlawful purpose of a conspiracy.

You must find, however, that the conspiracy existed, at least in part, in the Southern District of New York. This element will be met if you find that any one or more significant conspiratorial acts occurred within that area, which includes the boroughs of Manhattan and The Bronx.

1 gtlm
2 Once you are satisfied that the conspiracy
3 charged existed, you must ask yourself whether the defendant
4 was a member. In deciding whether the defendant was a
5 member of the conspiracy, you should consider whether on
6 all the evidence the defendant participated in the conspiracy
7 with knowledge of its unlawful purposes and in furtherance
8 of its unlawful objective.

9 The Government must prove beyond a reasonable
10 doubt that the defendant entered into the conspiracy with
11 a criminal intent, that is, with a purpose to violate
12 the law.

13 As I have already indicated, knowledge is a
14 matter of inference from proven facts. Science has not
15 devised a way to permit us to enter into a man's mind and
16 to know with exactitude what he knows or thinks. However,
17 you do have before you evidence of certain acts on the
18 part of the defendant. The Government contends that these
19 acts show beyond a reasonable doubt knowledge on the part
20 of the defendant of the unlawful purpose of the conspiracy.

21 It is not necessary that the defendant be fully
22 informed as to the details of the scope of the conspiracy
23 in order to justify any inference of knowledge on his part.
24 To have guilty knowledge the defendant need not know the
25 full extent of the conspiracy and all of its activities

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gtlm

and actors. Each member of the conspiracy may perform separate and distinct acts at different times and at different places. Some conspirators may play major roles while others play minor roles.

But I want to caution you that mere association with one or more of the conspirators does not make one a member of a conspiracy, nor is knowledge without participation sufficient. What is necessary is that the defendant participate with knowledge of at least some of the purposes of a conspiracy and with intent to aid in the accomplishment of these unlawful ends.

Once you have found a conspiracy to have existed and the defendant to have knowingly participated in it, the extent of his participation has no bearing on his guilt or innocence.

The guilt of a conspirator is not measured by the extent or the duration of his participation. Even if he participated in it to a degree more limited than that of his co-conspirator, he is equally culpable, so long as he was, in fact, a conspirator.

In other words, it is not necessary for a conspirator to have joined the conspiracy at its outset. He may join it at any point in its progress and still be held responsible for all that was before he joined and all that

may be done thereafter during the conspiracy's existence and while he remains a member.

A conspiracy, which once formed, is presumed to continue until its objectives are accomplished or there is an affirmative act of termination by its members or is otherwise terminated as, for example, by police intervention.

So, too, once a person is found to be a member of a conspiracy, he is presumed to continue in its membership until its termination, or unless there is proof of his withdrawal or disassociation.

Once you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant was a member, then the acts and declarations of another person found to be a member, whether or not on trial, made during its pendency and in furtherance of its objectives are considered the acts and declarations of each member, even though that member was not present.

Accordingly, if you find in accordance with these instructions that the alleged conspiracy existed and that the defendant or alleged co-conspirators were participants in it, then acts done and statements and declarations made in furtherance of the conspiracy by the persons found by you to have been members of the conspiracy may be considered against this defendant if you find he was a

member even though such acts or declarations were made in the absence and without the knowledge of the defendant.

It is important to note that this principle applies only to the acts and declarations done or made from the continuance of the conspiracy and in furtherance thereof, that is, to carry out an unlawful objective or purpose of the conspiracy. It does not apply to acts or declarations which do not have these characteristics.

However, statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making them.

If you find that a conspiracy existed, that it had as its objective the distribution and possession with intent to distribute heroin and that the defendant was a member of the conspiracy, there is an additional element to consider, and that is the requirement of an overt act.

You may not find the defendant guilty of conspiracy unless and until you are convinced beyond a reasonable doubt that at least one overt act charged in the indictment was committed by at least one of the conspirators in the Southern District of New York, that is, for present purposes, in Manhattan or The Bronx.

The overt acts charged in the indictment are as

follows:

"1. On or about the 19th day of August, 1976, the defendants James P. Zayas and Christopher Johnson met in an apartment at 1355 Shakespeare Avenue, Bronx, New York.

"2. On or about the 19th day of August, 1976, the defendant James P. Zayas had a conversation with a person in which the defendant James P. Zayas stated that he and defendant Christopher Johnson would sell one-eighth of a kilogram of heroin to an agent of the Drug Enforcement Administration acting in an undercover capacity.

"3. On or about the 19th day of August, 1976, the agent purchased one-eighth of a kilogram of heroin from the defendants James P. Zayas and Christopher Johnson, and the defendants received as payment for the sale \$11,000.

"4. On or about the 19th day of August, 1976, the agent was informed that the defendants James P. Zayas and Christopher Johnson were interested in making further sales of heroin to the agent.

"5. On the 3rd day of September, 1976, the agent met with the defendant James P. Zayas at 173 Street and Fort Washington Avenue, New York and discussed a further purchase of heroin from the defendant Christopher Johnson.

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2 "6. On the 17th day of October, 1976, the
3 defendant James P. Zayas telephoned the agent and told
4 the agent that the defendant Christopher Johnson was ready
5 to sell one-quarter of a kilogram of heroin to the agent
6 on the following night.

7 "7. On the 18th day of October, 1976, the agent
8 met the defendant James P. Zayas in the vicinity of 559
9 West 88 Street, New York, New York."

10 The offense of conspiracy is complete when the
11 unlawful agreement is made and any overt act is done by
12 a conspirator to effect the object of the conspiracy.
13 Hence, the overt act required is one which furthers the
14 objectives or purposes of the conspiracy. It does not
15 have to be a criminal act or an act which in and of itself
16 constitutes an objective of the conspiracy. In fact, it
17 may be an act which is innocent on its face, but it must
18 be of such character that it furthers or promotes or aids
19 and assists in accomplishing the purpose of the conspiracy.

20 It is not necessary for you to find that all
21 of the alleged overt acts charged in the indictment were
22 committed. It is enough if you find at least one of the
23 named overt acts charged in the indictment was committed
24 by one of the conspirators in furtherance of the con-
25 spiracy.

I will now turn to Count 2.

Before you can find the defendant guilty of the crime charged in Count 2, you must be convinced that the Government has proved the following elements with respect to this count beyond a reasonable doubt:

First, that on or about the date set forth in Count 2, August 17, 1976, in the Southern District of New York, Christopher Johnson distributed or possessed with intent to distribute a narcotic drug controlled substance.

Second, that he did so unlawfully and knowingly.

And, third, that the narcotic drug controlled substance involved was heroin.

I instruct you as a matter of law that heroin is a narcotic drug controlled substance. However, you must still find beyond a reasonable doubt that the substance in Government's Exhibit 1 is heroin.

I direct your attention to the stipulation of the Government and defense attorney regarding the chemical analysis of Joseph J. Barbato.

I further instruct you that Manhattan and The Bronx are in the Southern District of New York. You will note that the Government charges that the crimes took place in New York City.

The first fact which you must find beyond a

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reasonable doubt in order to convict the defendant of the substantive crime charged in the indictment is that he distributed or possessed with intent to distribute a narcotic drug controlled substance.

I have already instructed you on the phrase "a narcotic drug controlled substance." Now I would like to focus on the meaning of the terms "distribute" and "possess with intent to distribute" as they are used in the statute.

According to the statute, the term distribute means actual constructive or attempted transfer of a controlled substance.

A transfer in this context could be a sale or a giving away of a controlled substance for money or an exchange for something other than money.

As to the phrase "possess with intent to distribute," the word "possess" has its common everyday meaning, that is, to have something within one's control, either physically or constructively.

Physical custody obviously meets this requirement. In addition, one who does not have actual physical custody is said to possess constructively if he exercises dominion or control over an object. Such control may be demonstrated by the existence of a working relationship

2 between the person having such control and person with
3 actual physical custody or by the ability of such person
4 to dictate the movement or disposition of the object.

5 The word "intent" refers to a person's state of
6 mind, so the term "possess with intent to distribute" can
7 be fairly stated to mean to control an object with the state
8 of mind or purpose of transferring or delivering that
9 object.

10 With respect to this element and the second
11 count of the indictment, the Government contends that it
12 has proved beyond a reasonable doubt that on August 19, 1976,
13 the defendant knowingly transferred one-eighth of a kilogram
14 of heroin and possessed the heroin with the intention of
15 transferring it to someone else.

16 As to the second element, the terms "unlawfully,
17 willfully and knowingly" mean that you must be satisfied
18 beyond a reasonable doubt that the defendant knew what he
19 was doing and that he did it deliberately and voluntarily as
20 opposed to mistakenly or accidentally or as a result of
21 some coercion.

22 Of course, it is not necessary that the defendant
23 knew he was violating any particular law; rather, it is
24 sufficient if you are convinced beyond a reasonable doubt
25 that he was aware of the general unlawful nature of his act.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

Now, with respect to Count 2, the substantive count, it is not necessary for the Government to show that the defendant physically committed the crime himself.

Section 2 of Title 18, United States Code, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he had committed it himself.

It is a crime not only to commit the illegal acts to which I have just referred, but also to cause a crime to be committed or to aid or abet or procure or induce another person to commit such a crime.

Section 2 provides as follows:

"A. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or

2 procures its commission, is punishable as a principal.

3 "B. Whoever willfully causes an act to be done
4 which, if directly performed by him or another, would be
5 an offense against the United States, is punishable as a
6 principal."

7 To determine whether the defendant aided and
8 abetted the commission of an offense you ask yourselves
9 these questions:

10 Did he associate himself with the venture?

11 Did he participate in it as something he wished
12 to bring about?

13 Did he seek by his action to make it succeed?

14 If he did, then he is an aider and abettor.

15 Admissions of the defendant, in other words,
16 incriminating statements made or acts done by a defendant
17 outside court, are among the most effectual proofs in the
18 law and constitute the strongest evidence against the
19 party making them that can be given of the facts stated
20 in the admissions. Accordingly, you are entitled to give
21 great weight to the defendant's admissions in this case.

22 There has been testimony from and with respect
23 to the use of a person sometimes referred to as "an informant"
24 or "informer."

25 The services of informants are availed of by the

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2 Government agents at times to obtain introductions to
3 persons suspected of violating the law. There are certain
4 types of crime where, without the use of informants, detection
5 would be extremely difficult. Frequently the use of
6 informants is necessary to get leads for introductions
7 to persons allegedly engaged in illegal activities or
8 otherwise to aid enforcement officers.

9 The law from time immemorial has permitted the
10 use of informers, provided the rights of a defendant are
11 not violated.

12 You should neither discuss nor consider whether
13 or not you approve of the use of an informant in an effort
14 to detect a violation of the law. This is not to enter
15 into your deliberations.

16 If a potential witness could have been called
17 by the Government or by the defendant and neither side
18 called him, then you may infer that the testimony of the
19 absent witness might have been unfavorable either to the
20 Government or to the defendant or to both of them. But
21 on the other hand, it is equally within your province to
22 draw no inference at all from the failure of either side
23 to call a witness.

24 You should bear in mind, however, that there
25 is no duty upon either side to call a witness whose testimony

2 would be merely cumulative of testimony already in evidence.

3 You may not draw any inference, favorable or
4 unfavorable, towards the Government or the defendant on
5 trial from the fact that any person was not named as a
6 defendant, or having been named is not on trial before you.
7 Those matters are wholly outside your concern and have
8 no bearing on your function as jurors.

9 I have mentioned throughout the term "beyond a
10 reasonable doubt." What does that mean?

11 As the words imply, it is such a doubt as will
12 be entertained by a reasonable man after all the evidence
13 in the case is carefully analyzed, compared and weighed.

14 A reasonable doubt may arise not only from
15 the evidence produced, but also from the lack of evidence.

16 Since the burden is upon the Government to prove
17 the defendant guilty beyond a reasonable doubt of every
18 essential element of each crime charged, a defendant has
19 the right to rely upon the failure of the prosecution to
20 establish such proof.

21 Absolute or mathematical certainty is not required,
22 but there must be such certainty as satisfies your reason
23 and judgment and such that you feel conscientiously bound
24 to act upon it. It is not a fanciful doubt or a whimsical
25 or capricious doubt, for anything relating to human affairs

and depending on human testimony is open to some possible or imaginary doubt.

A reasonable doubt is such doubt as would cause a prudent person to hesitate before acting in matters of importance to him. In other words, if the evidence warrants, in your judgment, the conclusion that the defendant is guilty so as to exclude every other reasonable conclusion, you should declare him guilty. On the other hand, if on all the evidence you have a reasonable doubt as to the guilt of the defendant, you must find him not guilty.

Whenever in these instructions I have told you that a certain element must be established before there can be a conviction of the defendant on a certain count, I mean that this element must be established according to the standard of proof I have just explained, that is, proof beyond a reasonable doubt. That standard applies to every finding that is essential to a conviction of the defendant on either count.

If I have not repeated that standard of proof each time, bear in mind that it applies every time I speak to you about an element of the offense or a finding that you are entitled to make.

So with respect to all such elements or findings necessary for conviction on either count, I instruct you

1 that you may not conclude that such an element or such a
2 finding is established simply because you may think the
3 weight of the evidence tips somewhat in favor of the Govern-
4 ment. The standard of proof is proof beyond a reasonable
5 doubt.
6

7 Now, in performing your function, one of the
8 most important things you have to do is to pass upon the
9 credibility, that is, the believability of the various
10 witnesses who have appeared before you.

11 This passing on the credibility of each of the
12 witnesses, there are certain considerations you may well
13 have in mind. One of these is the appearance which the
14 witness made when he was on the stand.

15 You should try to size him up. Did he appear
16 to be telling the truth? Did he appear to be honest? Did
17 he appear to be intelligent? Did he appear to be a person
18 who would have observed accurately what he is telling you
19 about, who would be likely to have remembered it accurately
20 and who is capable of reporting it to you accurately?

21 Another question for you to have in mind regarding
22 each witness is whether the story he has told you is plausible.
23 Does it ring true, or are there inconsistencies in it?
24 How does it fit in with the other evidence in the case
25 which you do believe and other facts you find to have existed?

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2 Does it jibe with that evidence and those facts? In short,
3 does the testimony which was given by the particular witness
4 whose credibility you are considering seem to you to be
5 plausible?

6 Another question you may well ask yourself in
7 passing on the credibility of any witness is whether
8 that witness has any bias or interest in the outcome of
9 the case, and if so whether he has permitted that bias or
10 interest to color his testimony. It, of course, does not
11 follow simply from the fact that a witness does have a bias
12 or does have an interest in the outcome of the case that
13 his testimony is to be disbelieved.

14 Evidence that a witness has been convicted in
15 the past of a crime may be considered by you in determining
16 that witness' credibility. By this I mean that you may
17 consider prior convictions in determining that witness'
18 worthiness of belief.

19 In regard to the defendant, you may consider
20 the defendant's prior conviction only for that purpose and
21 not as any evidence that the defendant has committed the
22 crimes as charged.

23 The law permits a defendant at his own request
24 to testify on his own behalf. The testimony of the defendant
25 is before you. You must determine how credible it is. The

deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony.

You are instructed that interest creates a motive for false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony.

However, I want to say this with equal force to you; it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful and straightforward story. It is for you to decide to what extent, if at all, the defendant's interest has affected or colored his testimony.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

In weighing the evidence before you, you should

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bear in mind that evidence is of two types, direct evidence and circumstantial evidence.

Evidence is considered direct when it is introduced by a witness who testifies to what he saw, heard or observed, what he knows of his own knowledge or something which comes to him by virtue of his senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common sense of mankind. Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

Let us take one simple example, one which is often used in this courthouse, to illustrate what is meant by circumstantial evidence.

We will assume that when you entered the courthouse this morning the sun was shining brightly outside and it was a clear day, it was not raining and the sky was clear.

Now assume that in this courtroom the blinds and the drapes are drawn so you cannot look outside.

We are also assuming that we have blinds and drapes.

Assume that you are sitting in the jury box and despite the fact that it was dry when you entered the building, someone walks in carrying an umbrella from which water is dripping followed a short while later by a man who is wearing a wet raincoat.

On our assumption that you cannot look out of the courtroom to see whether it is raining or not, if you are asked "Is it raining?" you cannot say that you know it from your own direct knowledge or observation. But certainly upon the combination of facts given, even though when you entered the building it was not raining outside, it would be reasonable and logical for you to conclude that it is now raining outside.

That is about all there is to circumstantial evidence. You infer on the basis of reason and experience from established fact the existence of some further fact.

There are times when different inferences may be drawn from facts whether they are proved by direct or circumstantial evidence. The Government asks you to draw one set of inferences while the defendant asks you to draw

others. It is for you to decide and for you alone what inferences you will draw. But remember, you are to decide the case upon the evidence alone, and you must not be influenced by any assumption, conjecture or sympathy or any inference not warranted by the facts until proven to your satisfaction.

In this regard, keep in mind that only the answers to questions, not the questions themselves, are evidence in the case.

In conclusion, ladies and gentlemen, the purpose of your deliberations is to exchange views with your fellow-jurors, to discuss and consider the evidence, to listen to each others arguments, to present your own views and to reach a unanimous verdict based solely and wholly on the evidence if you can do so without violence to your own individual conscience and judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow-jurors.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal.

But on the other hand, if you should find that the law has been violated as charged, you should not hesitate

2 because of sympathy or any other reason to render a verdict
3 of guilty as a clear warning that crimes of that character
4 may not be committed with impunity. The public is entitled
5 to be assured of this.

6 Do not hesitate to re-examine your views and to
7 change your opinion when, after discussion, it appears to
8 be in error. But if after carefully weighing all the
9 evidence in the case and arguments of your fellow-jurors
10 you hold a conscientious view which differs from the others,
11 you are not to yield your view simply because you are out-
12 numbered. Your final vote must reflect your objective and
13 deeply thought out determination of the issues.

14 If in the course of your deliberations you need
15 to examine any of the exhibits or desire to have any portion
16 of the testimony read back, you may send in a note to the
17 Court asking for whatever will clear up any of the questions
18 you may have.

19 There is an admonition, however. I must ask you
20 when you do have a question you should be very specific
21 about that question. If you are specific, we can meet
22 with your request more quickly.

23 In communicating with the Court, I should also
24 admonish you that you should never indicate how your vote
25 may then be divided. The reason for this is simple. Your

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deliberations are secret and it would be a breach of that secrecy to communicate at any time how the jury has voted, except to announce that you have reached a unanimous verdict.

In the event your members cannot agree unanimously upon a verdict after due deliberation, do not indicate to anyone, including the court, how the jury has voted or why you cannot agree unanimously upon a verdict. Merely indicate that you consider yourselves deadlocked.

Mr. Foreman, if I should ask you any question in court during the course of your deliberations, pause before you answer and carefully consider my question. If the answer calls for a yes, no or maybe reply, give only that reply to my question and do not volunteer any additional statements. In any event, do not say more than necessary to inform me of your answer.

When you indicate that you have reached a verdict, do not indicate what your verdict is. You will be asked to state that orally through your foreman in open court.

I will conclude by simply saying your oath sums up your duty, and that is, without fear or favor to anyone, you will well and truly try the issues between the defendant and the Government of the United States based solely upon the evidence which has been introduced and the Court's instructions as to the laws.

2 Remember a separate crime or offense is charged
3 against the defendant in each count of the indictment.
4 Each offense and the evidence pertaining to it should be
5 considered separately.

6 The fact that you may find the defendant guilty
7 or not guilty of one of the offenses charged should not
8 control your verdict as to the other offenses charged
9 against the defendant. Your verdict with respect to each
10 count, whether it be guilty or not guilty, must be unani-
11 mous.

12 This case is important to the Government and it
13 is important to the defendant. Give it your faithful
14 consideration.

15 Will counsel please approach the bench.

16 (At the bench.)

17 THE COURT: Exceptions or additions?

18 MS. COTE: None, your Honor.

19 MR. JOY: Your Honor, it occurs to me that con-
20 ceivably on the evidence the jury might feel there was a
21 conspiracy between Christopher Johnson and Carlos Medrano.

22 I think perhaps you should include in your
23 charge a conspiracy -- that the conspiracy can only be
24 with Jimmy Zayas and not the Government's informer.

25 THE COURT: Jo, I don't think so. I won't add

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2 that. You can have an exception.

3 MR. JOY: Thank you.

4 (In open court.)

5 THE COURT: I will say that I am giving a copy
6 of the indictment to the jury.

7 Swear the marshal, please.

8 (Marshal duly sworn.)

9 THE COURT: Marshal, in view of the hour, I
10 would suggest that you take the jury and the alternates
11 to lunch. When the alternates have been returned to the
12 courthouse, I will discharge the alternates with the
13 thanks of the Court.

14 THE MARSHAL: All right, your Honor.

15 THE COURT: I will be here on their return and
16 take attendance. Don't discharge the alternates before
17 I have taken attendance.

18 You can take them into the Jury Room now if you
19 like.

20 You are not to begin your deliberations until
21 you return from lunch. And don't discuss it while you are
22 at lunch.

23 (At 12:15 p.m., the jury left the courtroom
24 for lunch to return to deliberate upon a verdict.)

25 MS. COTE: Your Honor, the Government will

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prepare a redacted indictment for you.

THE COURT: We have already prepared it.

MS. COTE: Thank you very much.

THE COURT: That is the one that will go into
the Jury Room.

MS. COTE: What time would you like us back?

THE COURT: I think at 2 o'clock.

I think it will take some time to get organ-
ized.

(Luncheon recess.)

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AFTERNOON SESSION

2 p.m.

(In open court.)

(Two alternate jurors excused.)

(At 2 o'clock p.m., the jury retired to the Jury Room to deliberate upon a verdict.)

(At 2:40 p.m., a note was received from the jury.)

(At 3:10 p.m., in open court; jury present.)

THE COURT: With respect to your note, we are going to read to you the testimony of Mr. Medrano stating the first time he met Mr. Johnson, and Mr. Johnson's testimony stating the first time that he met Carlos.

You cannot have a copy of Mr. Pavlick's written report because that is not in evidence.

(A portion of the direct examination and cross-examination of the witness Medrano read to the jury.)

(A portion of the direct examination and cross-examination of the witness Johnson read to the jury.)

THE COURT: With respect to your request for coffee, we really have no facilities for providing coffee, so that we are going to have to deny that request, and I

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hope that you don't think of it as cruel and inhuman punishment.

I will let you go back to your deliberations.

(At 3:20 p.m., the jury returned to the Jury Room to continue to deliberate upon a verdict.)

(At 3:40 p.m., a note was received from the jury.)

(In open court in the absence of the jury.)

THE COURT: We have another note which indicates to me that maybe we ought to all stay in place. This apparently is a questioning jury.

"If there is one, what is the legal definition of entrapment?"

I am going to indicate to the jury that there is no defense of entrapment entered here and, consequently, they are not to consider or discuss entrapment as such.

Hearing nothing to the contrary --

MR. JOY: I am thinking, your Honor.

THE COURT: You are taking too long, Mr. Joy.

MR. JOY: I think what the jury is -- it is true there is not a legal defense of entrapment here. I just wonder, however, if that's what they really mean when they say entrapment as our term -- if they mean whether the agents in the case have set -- you know, altered their

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2 testimony or done one thing or another to convict the
3 defendant, then that may be what they mean by entrapment.

4 That's why I wonder whether your Honor could
5 perhaps be a little more explicit when you explain the
6 technical defense of entrapment.

7 THE COURT: I don't think I should be any more
8 explicit than that.

9 I think that is sufficient for their purposes.
10 They are not to discuss the defense of entrapment.

11 MS. COTE: Your Honor, the Government agrees.

12 THE COURT: Let us get the jury in.

13 (At 3:45 p.m., the jury entered the courtroom.)

14 THE COURT: Ladies and gentlemen of the jury, I
15 have your note:

16 "If there is one, what is the legal definition
17 of entrapment."

18 I have to inform you in this case a defense of
19 entrapment has not been entered and, therefore, cannot be
20 considered by you, so that you are not to discuss entrap-
21 ment as such, which is a technical legal defense. That
22 is not before you.

23 If it had been, I would have instructed you as
24 to the definition in my charge.

25 All right.

(At 3:47 p.m., the jury returned to the Jury Room to continue to deliberate upon a verdict.)

(At 5:05 p.m., a note was received from the jury.)

(In open court in the absence of the jury.)

THE COURT: I have a further note.

Is the verdict on either charge contingent upon the other?"

Of course, the answer is no. I will read to them again my instruction which I thought was clear:

"Remember a separate crime or offense is charged against the defendant in each count of the indictment. Each offense and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty of one of the offenses charged should not control your verdict as to the other offense charged against the defendant."

MS. COTE: That decision is acceptable to the Government, your Honor.

THE COURT: Mr. Joy?

MR. JOY: I think, under the circumstances, yes is all I can say.

THE COURT: All right.

Will you get the jury in, please.

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2 (At 5:15 p.m., the jury entered the court-
3 room.)

4 THE COURT: Ladies and gentlemen, the answer
5 to your last question is no.

6 But so that there is no misunderstanding, I am
7 going to read to you what I read to you from my charge
8 earlier.

9 "Remember a separate crime or offense is charged
10 against the defendant in each count of the indictment.
11 Each offense and the evidence pertaining to it should be
12 considered separately. The fact that you may find the
13 defendant guilty or not guilty of one of the offenses charged
14 should not control your verdict as to the other offense
15 charged against the defendant."

16 I will let you return to your deliberations.

17 (At 5:17 p.m., the jury returned to the Jury
18 Room to continue to deliberate upon a verdict.)

19 (At 6 p.m., in open court; jury present.)

20 THE COURT: In view of the hour, ladies and
21 gentlemen, I am going to release you until tomorrow
22 morning at 9 o'clock.

23 Again I must admonish you, don't discuss this
24 matter outside of the Jury Room and not in the elevators.
25 Don't discuss any of the personalities in the courtroom.

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2 When you get back tomorrow morning at 9 o'clock,
3 you can deliberate.

4 All right, we will see you tomorrow morning
5 at 9 o'clock.

6 (An adjournment was taken to May 12, 1977 at
7 9 a.m.)

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1 gtlm

2 UNITED STATES OF AMERICA

3 vs.

77 Cr. 7

4 CHRISTOPHER JOHNSON

5 May 12, 1977
6 9:15 a.m.

7 (At 9:15 a.m., the jury assembled in the Jury
8 Room and continued to deliberate upon a verdict.)

9 (At 10 o'clock a.m., a note was received.)

10 (In the robing room at 11:20 a.m.; counsel
11 present.)

12 MR. COTE: Your Honor, I was wondering how much
13 of the charge you plan to reread regarding the jury's
14 second question.

15 THE COURT: Only those portions which deal with
16 intent and possession with intent.

17 MS. COTE: I was wondering if we could include
18 the part where it indicates that distribution or possession
19 with intent, they are alternative grounds for finding the
20 crime.

21 MR. JOY: That isn't what they have asked.

22 THE COURT: That isn't what they asked for so
23 I am not going to include it.

24 (In open court; jury present at 11:25 a.m.)

25 THE COURT: Good morning, ladies and gentlemen.

1 All right Mr. Reporter, if you will start to
2 read.
3

4 (A portion of the direct and cross-examinations
5 of Mr. Pavlick's testimony was read to the jury.)

6 (A portion of Mr. Burstein's redirect examina-
7 tion was read to the jury.)

8 (A portion of the Mr. Johnson's direct and
9 cross-examination was read to the jury.)

10 THE COURT: With respect to your question, "Can
11 you please give us your legal definition of possession with
12 intent to distribute?" As I indicated to you earlier, as
13 to the phrase "possess with intent to distribute," the
14 word "possess" has its common everyday meaning, that is,
15 to have something within one's control either physically
16 or constructively. Physical custody obviously meets this
17 requirement.

18 In addition, one who does not have actual physical
19 custody is said to possess constructively if he exercises
20 dominion or control over an object. Such control may be
21 demonstrated by the existence of a working relationship
22 between the person having such control and the person
23 with actual physical custody or by the ability of such
24 person to dictate the movement or disposition of the object.

25 The word "intent" refers to a person's state of

1 gtlm

2 mind, so the term "possess with intent to distribute" can
3 be fairly stated to mean to control an object with the
4 state of mind or purpose of transferring or delivering that
5 item.

6 All right. You may return to your deliberations.

7 (At 11:50 p.m., the jury returned to the
8 Jury Room to continue to deliberate upon a verdict.)

9 MR. JOY: Your Honor, I would like to renew my
10 request in light of the jury's last request for the defin-
11 ition of possession to point out that the jury may be think-
12 ing that it is possible for the defendant to have conspired
13 or to have aided and abetted Carlos Medrano in this activity,
14 and I would ask your Honor to consider giving them an
15 instruction that this is not possible since Carlos Medrano
16 was acting as a Government informer.

17 THE COURT: I would not grant that request.

18 I think they have the indictment. They are
19 aware of who is being accused of being a co-conspirator
20 with Mr. Johnson.

21 I don't think that we need do anything more than
22 that.

23 All right.

24 (At 12:13 p.m., in open court; jury present.)

25 (Jury roll called; all present.)

USA 33a-475
(ED. 4-23-71)

Court
EXHIBIT

U. S. DIST. COURT
S. D. OF N. Y.

1:56 p.m.

5/11/77

FPI-M-9-24-75-50M-4417

We would
like a copy
of the indictment

156 pm

Court Exhibit 1

5/11/77

3:31 PM

Cx4

5/11/77

IF THERE IS ONE, WHAT IS THE
LEGAL DEFINITION OF
"ENTRAPMENT"

A 33a-475
D. 4-23-71)

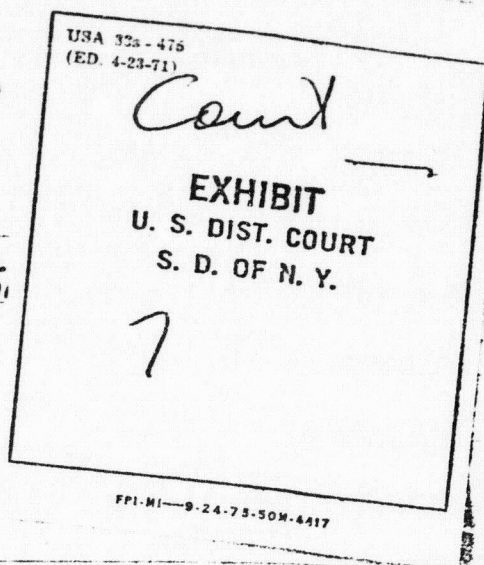
Count

EXHIBIT

U. S. DIST. COURT
S. D. OF N. Y.

24

CX-7 -- 9:50 A.M.
5/12/77



CAN we have the Testi.
The following

1. Paulick Identifying Johnson
Shakespeare Ave.

2. Burstein's Testimony About seeing
Johnson's Car at Shakespeare Ave
+ Johnson in the Doorway

3. Johnson's Testimony as to where
he was at approx 2:00PM 8/19/76
+ ~~to~~ his whereabouts before
going to Grants Tomb?

4. Paulick Testimony Regarding when
Johnson + Carlos came back
with the Heroin from 116th Street
+ the actions that he saw
in Johnson's car.

CX-8

10:57 A.M.

5/12/77

~~Can you Read us The
Law as to what is the~~

Can you Please give us
your Legal Definition of; Possession with
intent To Distribute?

LA 33a - 475
(D. 4-23-71)

Count

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

8

FPI MI-9-24-75-50N-4417

COPY RECEIVED
ROBERT B. FISKE JR.
SEP 2 - 1977
U.S. ATTORNEY
SO. DIST. OF N.Y.